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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-488

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE

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Interest of Amicus

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York.

It was founded to assist black persons to secure their constitutional and statutory rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of race discrimination issues regarding employment. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). The Legal Defense Fund believes that its experience in such litigation and the research it has performed will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

Question Presented

Whether Section 706(f)(1) and (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) and (g) (1976), by providing that the Equal Employment Opportunity Commission "may bring a civil action" seeking a decree ordering

"such affirmative action as may be appropriate, which may include... back pay," requires compliance with the requirements of Rule 23, Fed. R. Civ. P., and amends this Rule so as to make its provisions, to the extent possible, applicable to such an action.1/

1/ The view that prevails in the courts gives a negative answer to this question. EEOC v. Federal Reserve Bank, 21 FEP Cases 742 (S.D.N.Y. 1979); EEOC v. Mid-City Care Center, 20 EPD. ¶ 30,275 (W.D. Tenn. 1979); EEOC v. Stroh Brewery, 19 EPD. ¶ 9226 (E.D. Mich. 1979); EEOC v. Avco New Idea Div., 18 FEP Cases 311 (N.D. Ohio 1978); EEOC v. Singer Controls Co., 80 F.R.D. 76 (N.D. Ohio 1978); EEOC v. International Tel. and Tel., Civ. No. 77-790 (D.N.J. Mar. 16, 1978); EEOC v. Raymond Metal Prods. Co., 17 FEP Cases 206 (D. Md. 1978); EEOC v. Schlueter Mfg. Co., 17 FEP Cases 53 (E.D Mo. 1978); EEOC v. Whirlpool Corp., 80 F.R.D. 10 (N.D. Ind. 1978); EEOC v. Pinkerton's Inc., 14 FEP Cases 1431 (W.D. Pa. 1977); EEOC v. CTS of Asheville, Inc., 13 FEP Cases 852 (W.D.N.C. 1976); EEOC v. Vinnell-Dravo-Lockheed-Mannix, 417 F. Supp. 575 (E.D. Wash. 1976); EEOC v. Rexene Polymers Co., 10 FEP Cases 61 (W.D. Tex. 1975); EEOC v. Lutheran Hospital, 10 FEP Cases 1177 (E.D. Mo. 1974); EEOC v. Mobil Oil Corp., 6 FEP Cases 727 (W.D. Mo. 1973). But the Fifth Circuit and a few district courts from other circuits have given an affirmative answer. EEOC v. D.H. Holmes Co., 556 F.2d 787 (5th Cir. 1977), cert. denied, 436 U.S. 962 (1978); Local 194, Retail, Wholesale, and Department Store Union v. Standard Brands, Inc., Civ. No.74-587 (N.D. Ill. Dec. 6, 1979); EEOC v. Westinghouse Elec. Corp.,

Statement of the Case

The Equal Employment Opportunity Commission (EEOC) brought this action under Section 706(f)(1) and (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) and (g) (1976). Alleging that defendants discriminated against women employees with respect to access to craft jobs, promotion to managerial positions, and maternity leave, the EEOC's complaint prays for injunctive relief and back pay for the indi-

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1/ cont'd.

81 F.R.D. 528 (M.D.N.C. 1979); EEOC v. Delaware Trust Co., 81 F.R.D. 448 (D. Del. 1979); EEOC v. Page Engineering Co., 17 EPD ¶ 8603 (N.D. Ill. 1978); EEOC v. Akron Nat'l Bank & Trust Co., 78 F.R.D. 684 (N.D. Ohio 1978); EEOC v. Continental Oil Co., 13 FEP Cases 785 (D. Colo. 1975), aff'd on other grounds, 584 F.2d 884 (10th Cir. 1977). The commentators appear divided. Compare Reiter, The Application of Rule 23 to EEOC Suits: An Examination of EEOC v. D.H. Holmes Co., 28 Syr. L. Rev. 741 (1977) (negative) with Comment, Certification of EEOC Class Suits Under Rule 23, 46 Univ. Chi. L. Rev. 690 (1979); Bumpass, The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission, 29 Case West. Res. L. Rev. 343 (1979) (affirmative).

viduals affected by the challenged discriminatory practices. These forms of relief are specifically authorized by Section 706(g) of Title VII.

The district court referred the action to a magistrate for trial. On the same day, defendants moved "to dismiss the class action aspects of plaintiff's complaint" on the ground that the Commission had failed to move for certification as a class representative pursuant to Rule 23 within the time limit set by a local rule of the Western District of Washington. The magistrate found that Rule 23 did not apply to the action brought by the Commission and recommended that the motion be denied. The district court adopted this recommendation.

An interlocutory appeal from this ruling was certified in accordance with 28 U.S.C. § 1292(b) (1976). The court of appeals affirmed. It held that Rule 23, on its face, cannot be applied to an action brought by the Commission and ruled that Section 706 of Title VII does not require performance of the impossible task of applying Rule 23 to an action for which it clearly had not been

written. The court of appeals stressed that its ruling would have the desirable consequence of avoiding "the inevitable challenge to the EEOC as a class representative" and a "certification process [that] would be time consuming and costly, and would serve no useful purpose...." EEOC v. General Telephone Co., 599 F.2d 322, 334 (9th Cir. 1979).

Summary of Argument

I

Rule 23, on its face, cannot be applied to an action brought by the EEOC under Section 706 of Title VII. The EEOC can never meet the requirements of Rule 23(a)(3) and (4), since it is not a member of the class it represents, since its claim is not typical of the claims of the class, and since it cannot so adequately and fairly represent the class as to justify binding its members by judgment. Hansberry v. Lee, 311 U.S. 32 (1940). In addition, the EEOC will in many cases not be able to meet other requirements of Rule 23. See EEOC v. Westinghouse Electric Corp., Nuclear Turbine Plant, 81 F.R.D. 528 (M.D. N.C. 1979)(EEOC held to fail to meet commonality and typicality requirements).

II

Neither the clear and plain statutory language nor the legislative history permits reading into Section 706 the two provisions that are needed to make Rule 23 applicable to Section 706 actions. They do not permit interpolation of a provision into Section 706 requiring that the EEOC comply with Rule 23, and they do not permit interpolation of the amendment to Rule 23 that would be needed to make it applicable to Section 706 actions. Distortion of the plain meaning and legislative history of Section 706 to reach these results would frustrate the clear legislative purpose of giving the EEOC the right to seek class relief in actions which are different from, and therefore need not comply with the requirements for, Rule 23 class actions.

III

Section 706 grants the EEOC a right of action that is sui generis. By an action under Section 706, the Commission vindicates the public interest and, in a certain measure, the interests of the victims of the discrimination alleged. While, in

seeking to obtain appropriate relief for the victims of discrimination, the Commission acts as the representative of a class of victims, the Commission's action is not a class action in the sense of Rule 23. For the judgment rendered in such an action is binding only upon those members of the class who intervened in the action or who accepted compensation under the judgment and knowingly waived their individual rights of action.

The attempt to superimpose, to the extent possible, the requirements of Rule 23 on an action under Section 706 is inspired by the desire to limit substantially the availability of such an action. Imposition of such a limitation would frustrate the legislative intent of broadening the availability of relief from discrimination by giving the EEOC its own right of action, in addition to already available class actions under Rule 23 by private litigants.

Argument

I

RULE 23, BY ITS CLEAR TERMS, CANNOT BE APPLIED TO AN ACTION BROUGHT BY THE EEOC UNDER SECTION 706 OF TITLE VII.

A. An Action Under Section 706 Cannot Meet the Basic Requirements of Rule 23(a).

Any action, in order to qualify as a class action under Rule 23, must meet the requirements specified in Rule 23(a). An action by the EEOC under Section 706 can never meet three of the five requirements this paragraph imposes.

1. The EEOC is not a member of the class.

First, the Commission cannot qualify as "[o]ne or more members of a class [who] may sue or be sued as representative parties on behalf of all" within the meaning of Rule 23(a). The Commission has not been the victim of the alleged discrimination and therefore cannot be a member of a class composed of victims of such discrimination. Of course, Section 706 gives the Commission standing to sue and renders it a real party in interest. But it does not, and cannot, make the Commission a member of a class of which it is not a member.

The Fifth Circuit in EEOC v. D.H. Holmes Co., 556 F.2d 787 (1977), cert. denied, 436 U.S. 962 (1978), disregarded the clear and unambiguous language of Rule 23(a) by stressing that Congress clearly intended to give the Commission the right to recover back pay for members of the class and therefore must have intended to authorize the Commission to bring a class action under Rule 23.[2/] The non sequitur in the court's reasoning is obvious: The circumstance that Congress gave the Commission the right to sue on behalf of individual victims of discrimination by no means warrants the conclusion that Congress wished to subject the Commission to the class action regimen of Rule 23. On the contrary, since the facial inapplicability of Rule 23 to a Section 706 action is so obvious, the only conclusion warranted is that Congress intended to give the Commission the right to bring an action that is not a Rule 23 class action, but a statutory action sui generis.

2/ The Fifth Circuit put it thus:

> The crux of the matter is this: Having been set up by law to bring civil actions on behalf of persons allegedly discriminated against, EEOC has standing to sue, is a real party in interest, and, we hold, for purposes of Rule 23, is a member of the class. 556 F.2d at 797.

The precise nature of this action and its apt accommodation of the Commission's public interest in combating discrimination to the interests of the individual victims of discrimination will be discussed below. It suffices to stress here that rejection of the applicability of Rule 23 to Section 706 actions is wholly compatible with recognition of the Commission's right to bring a quite different form of action on behalf of a group of affected persons.

2. The EEOC's claim is not typical of the claims of the class.

Second, the Commission's claim is not "typical" of the claims of the class within the meaning of Rule 23(a)(3). Since the Commission has no claim of discrimination of its own, its claim cannot be typical of the claims of the victims of discrimination. The Fifth Circuit, in EEOC v. D.H. Holmes Co., supra, completely disregarded this requirement. It is clear, however, that if Rule 23 is to be applied to a Section 706 action, this requirement would have to be met. And since it cannot be met, Rule 23 could be applied to a Section 706 action only if Section 706 could somehow be construed as amending Rule 23.

There is no basis for concluding that Rule 23 has been amended sub silentio so as to make its typicality requirement inapplicable to EEOC actions under Section 706. The fact is that the Commission's claim is not typical of the claims of individual members of a class. And the Commission's inability to meet the requirement of typicality makes it impossible for the Commission to qualify as a member of a class who can bind other members of the class. As this Court has stressed, the requirement of typicality is imposed in order to ensure that class representatives "possess the same interest and suffer the same injury" as the class members. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). Only if that requirement is met, can there be a reasonable assurance that the representative will so adequately represent the class that it can properly bind its members.

The courts have therefore properly insisted on compliance with this requirement in all cases in which a government agency has brought a Rule 23 class action. See, e.g., Illinois ex rel. Bowman v. Home Federal Savings & Loan Association, 521 F.2d 704 (7th Cir. 1975); In re Anthracite

Coal Antitrust Litigation, 78 F.R.D. 709, 717-18 (M.D. Pa. 1978).[3/] If EEOC actions under Section 706 were to be brought only as Rule 23 class actions, the Commission would therefore have to comply with the requirement of typicality. At least one court has already reached this conclusion and refused to certify a Section 706 action as a class action due in part to the Commission's failure to meet the typicality requirement. EEOC v. Westinghouse Elec. Corp., Nuclear Turbine

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3/ The Commission is therefore in a position that is quite different from that of the associations that were held proper class representatives in decisions such as Smith v. Board of Education, 365 F.2d 770, 777-78 (8th Cir. 1966), and Undergraduate Student Association v. Peltason, 359 F. Supp. 320, 323 (N.D. Ill. 1973). The associations in those cases had been formed by individual members of the class to promote the interests sought to be vindicated in those class actions. In those cases, individual members of the class appeared as individual parties plaintiff along with the association. In addition, the consequence of the ruling was to permit broadened class relief that would otherwise not have been available. The Commission is, of course, not a voluntary association formed by members of the class. And it needs no expansive reading of Rule 23 in order to be able to bring an action on behalf of the victims of discrimination.

Plant, 81 F.R.D. 528 (M.D.N.C. 1979). The Commission's inability to meet this requirement provides additional evidence that an EEOC action under Section 706 is not a Rule 23 class action, but a different form of action which does not result in a judgment that is preclusive against non-participating members of the class.

3. The EEOC cannot fairly and adequately protect the interests of the class.

Third, the Commission cannot meet the requirement of Rule 23(a)(4) that it "fairly and adequately protect the interests of the class." The instant case is highly unusual. For it is the Commission itself that is asserting that it cannot so fairly and adequately represent the interests of the class members as to justify the rendition of a judgment under Rule 23 that would bind all members of the class. One may well ask why the defendants cast themselves into the unusual role of arguing that the class representative, who denies that it can fairly represent the class, can do so. After all, it is normally the defendant who contests that the plaintiff can bring a class action. No doubt, defendants expect that, if only

it can be established that Section 706 actions must meet the requirements of Rule 23, it will become much easier to defeat such actions, by arguing in individual cases that the Commission has not met them.

Whatever the defendants' motivation, it is clear that a judicial decision holding, over the plaintiff's objection, that the plaintiff so adequately represents the class that it can render a judgment binding upon the class, would raise serious constitutional problems. This Court has long held that members of a class can be bound by a judgment only if their representative represents them fairly and adequately. Hansberry v. Lee, 311 U.S. 32 (1940). It would be anomalous, indeed, if this Court were to hold that the class members are bound, even though their representative strongly contests that it can so adequately and fairly represent them as to make it compatible with due process to bind them.

Fortunately, the Court need not address this question. The Commission has itself recognized that its "interests transcend those of the complainant and may differ in significant ways." Petition For a Writ of Certiorari to the United

States Court of Appeals for the Fifth Circuit in EEOC v. D.H. Holmes, Inc., October Term, 1977, Supreme Court of the United States at 10. See also EEOC v. D.H. Holmes, Co., supra, 556 F.2d at 797. As held in EEOC v. Occidental Life Insurance Co., 535 F.2d 533, 542 (9th Cir. 1976), aff'd, 432 U.S. 355 (1977), "the EEOC is charged with the vindication of public policy, not merely with the enforcement of private rights."

In its efforts to promote the public policy of eliminating discrimination, the EEOC may well be less than insistent that the employer grant to individual employees all benefits that they lost as the result of discrimination. After all, the "primary role of the EEOC is to seek elimination of unlawful employment practices," Hutchings v. United States Industries, Inc., 428 F.2d 303, 309 (5th Cir. 1970), and the EEOC may be prepared to settle for less back pay than may legally be due in exchange for a broad prohibition of alleged discriminatory practices. In addition, the Commission, as this Court has noted in Occidental Life Insurance Co. v. EEOC, supra, 432 U.S. at 362, has a "burgeoning workload, accompanied by

insufficient funds and a shortage of staff," and may find that its limited resources are better applied towards obtaining comprehensive prohibitions of discriminatory practices than to vigorous pursuit of indiviuals' claims for back pay.

The opinion in Winfield v. St. Joe Paper Co., 20 FEP Cases 1103 (N.D. Fla. 1979), provides an apt illustration of the Commission's practical predicament in serving the public interest of eliminating discriminatory employment practices and pursuing at the same time claims for back pay of individual employees. In that case, the Commission negotiated a conciliation agreement providing for certain types of affirmative relief for a group of black employees for payment of specified amounts of back pay. An agent of the Commission persuaded the covered employees to accept the agreement and sign releases by making such statements as, "a bird in the hand is worth two in the bush" and "take it or leave it, [and] get your own lawyer." 20 FEP Cases at 1110. The court held that the employees who signed the releases had not knowingly waived their rights to the additional back pay to which they might be legally entitled.

The EEOC's approach to a case of discrimination in employment will necessarily differ from that of individual employees intent upon getting their due. Proper recognition of that difference compels the conclusion that the Commission cannot constitutionally be a proper representative in an action that would result in a judgment binding upon individual employees.

B. An Action Under Section 706 Will, in Many Instances, Not Be Able To Meet Additional Requirements Imposed by Rule 23.

Not only can an action brought by the EEOC under Section 706 never meet the three requirements specified in Rule 23(a)(3) and (4), such an action would, in many instances, not be able to meet additional requirements imposed by Rule 23.

If the victims of the alleged discrimination are not so numerous that their joinder would be impracticable, the requirement of Rule 23(a)(1) could not be met. Dismissal of a Section 706 action on the ground that the number of employees affected by the discrimination is relatively small would be particularly anomalous. For it would

permit the Commission to bring actions only in cases in which the number of employees affected is very large and the litigation burden on the Commission correspondingly heavy, while precluding the Commission from obtaining injunctive relief and back pay for a relatively small number of employees. Clearly, a result so obviously at odds with the legislative intent condemns itself. As the court stated in EEOC v. Whirlpool Corp., Local 808, 80 F.R.D. 10, 19 (N.D. Ind. 1978):

> [I]f the Rule 23 numerosity requirement were applied to Commission actions, in cases where the class of aggrieved employees is too small for that requirement to be met, those discriminatees would as a practical matter often be left without legal recourse.

Application of Rule 23 to Section 706 actions would also preclude such actions if the employer's discriminatory practices differed in regard to individual employees and their resulting injuries differed correspondingly. For in such cases, the court might be unable to find that the employer had acted "on grounds generally applicable to the class" within the meaning of Rule 23(b)(2). Here again, the decision in EEOC v. Westinghouse

Elec. Corp., Nuclear Turbine Plant, supra, is most instructive. In this case, the court first rejected, on the authority of Holmes, the EEOC's contention that its Section 706 action was not subject to Rule 23, and the court then refused to certify the action as a class action under Rule 23 in part because of the EEOC's failure to meet the requirements of Rule 23(b)(2). The decision provides a graphic illustration of the undue benefits employers will seek to draw from application of Rule 23 to Section 706 actions.

C. Subjecting Section 706 Actions to Rule 23 Requirements Would Greatly and Unfairly Add to the EEOC's Burdens and Would Substantially Weaken Enforcement of Title VII.

As demonstrated, the plain language of Rule 23 makes clear its inapplicability to EEOC actions under Section 706. Moreover, any attempt to distort and eviscerate Rule 23 so as to render it applicable to Section 706 actions would burden such actions with procedural requirements that make no sense. Virtually all the requirements of Rule 23 that a Section 706 action could never, or infrequently, meet are based on the notion that

adequate, although often most burdensome, procedural requirements must be met before an action can be permitted to go forward that is to result in a judgment binding upon the persons represented. But since a Section 706 action will not result in such a judgment, there is no need to impose these requirements. These would merely render Section 706 actions more complex, time-consuming, and expensive without producing a judgment binding on the class.

The inappropriateness of trying to apply Rule 23 to EEOC actions under Section 706 is highlighted by the circumstance that the quite similar pattern or practice action under Section 707 has never been ruled subject to Rule 23 requirements. Even the Fifth Circuit, in Holmes, held that Rule 23 did not apply to Section 707 actions. 556 F.2d at 792, n.8. However, if, as the courts have unanimously ruled, a Section 707 action is not subject to Rule 23, an action under Section 706 should equally not be subject to that Rule. In both types of actions, the Commission sues on behalf of employees who are victims of discrimination and, in both types of actions, the Commission may seek back pay and other relief on behalf of such

employees. Sections 706(g) and 707(e) (last sentence) of Title VII, 42 U.S.C. §§ 2000e-5(g), 2000e-6(e) (1976).

No court that has held Rule 23 applicable to Section 706 actions has satisfactorily explained how such a ruling can be reconciled with the often simultaneously expressed and indubitably correct view that Rule 23 does not apply to Section 707 actions. The incongruity of the view that Rule 23 does apply to Section 706 actions is dramatically illustrated by EEOC v. Akron Nat. Bank & Trust Co., 78 F.R.D. 684 (N.D. Ohio 1978). In this case, the court felt compelled to follow the Fifth Circuit's ruling in Holmes that Rule 23 applied to a Section 706 action, but also felt compelled to hold, on substantially the grounds advanced here, that the Commission could never meet the requirements of Rule 23. Seeking to escape from so incongruous a result, the court then permitted the Commission to amend its complaint to allege a claim under Section 707, in which the Commission could seek exactly the same relief, including back pay, which it had sought in the Section 706 action.

The court's decision that back pay was recoverable in a Section 707 action is squarely supported by Section 707(e) (which provides that such an action shall be conducted as provided in Section 706), by the Sixth Circuit's decision in United States v. Masonry Contractors Association, 497 F.2d 871 (6th Cir. 1974), and by the Fifth Circuit's own decision in United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). And the court's evident relief that it could permit the Commission to seek the same remedies for affected individuals under Section 707 without being hamstrung by Rule 23 testifies to the impropriety of imposing the inappropriate and burdensome requirements of Rule 23 on EEOC actions under Section 706.

II

SECTION 706 OF TITLE VII DOES NOT REQUIRE THE EEOC TO COMPLY WITH RULE 23 AND DOES NOT AMEND RULE 23 SO AS TO MAKE IT APPLICABLE TO ACTIONS BROUGHT BY THE EEOC.

A. The Plain Text of Section 706 Gives the EEOC the Right To Bring This Action Without Complying With Rule 23.

Section 706's language is plain and clear. It gives the Commission, in explicit and unqualified terms, the right "to bring a civil action"

seeking an order directing "such affirmative action as may be appropriate, which may include....back pay." Section 706(f), (g) of Title VII, 42 U.S.C. § 2000e-5(f), (g) (1976). Defendants seek to rely on statements made by Senators Javits and Williams, in an attempt to persuade this Court to disregard Section 706's plain language. This effort cannot succeed. As this Court noted in TVA v. Hill, 437 U.S. 153, 184 n.29 (1978):

> When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. Ex parte Collett, 337 U.S. 55, 61 (1949), and cases cited therein. Here it is not necessary to look beyond the words of the statute....

To the same effect, see Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947) ("We are invited to make a lengthy examination of views expressed in Congress....There is, however, no ambiguity in this Act to be clarified by resort to legislative history....").

Moreover, the legislative history of Section 706 is wholly compatible with this section's plain meaning. Defendants seek to put a construction upon the legislative history in an effort to change the plain and clear language of Section 706 in two crucial respects: First, they urge

that the legislative history requires reading into Section 706 an amendment to Rule 23 that can nowhere be found in the clear statutory language; and second, they urge that the legislative history requires reading into Section 706 limitations upon the unqualified right of action given to the Commission that cannot possibly be found in Section 706's clear language.

The legislative history cannot accomplish this legerdemain. The attempt to rewrite the clear text of Section 706 by reliance upon legislative history that, at best, is highly ambiguous, and, if properly read, supports the plain meaning of Section 706, should be rejected. Such an attempt seeks to curtail drastically the powers of the EEOC to vindicate the public interest in eradicating discrimination. These powers the legislature clearly sought to enlarge, not to curtail.

As defendants have themselves stressed (Petitioners' Brief, p. 8), "amendments by implication are not favored. United States v. Welden, 377 U.S. 95, 84 S.Ct. 1082, 12 L.Ed. 2d 152 (1964); Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed. 2d 389 (1963)." Defen-

dants seek to persuade this Court to rule not only that Section 706 amends by implication Rule 23, but also that the legislative history amends by implication Section 706 itself. As they themselves recognize, this attempt at double amendment by implication is not "favored." Indeed, it manifestly violates the clear legislative intent.

B. The Legislative History of Section 706 Confirms That the Legislature Intended To Give the Commission the Right To Bring Section 706 Actions Without Complying with Rule 23.

Defendants have argued that statements made by Senator Javits during the Senate debates on the 1972 amendments to Title VII support their view that the legislature intended Section 706 actions to be subject to Rule 23. The statements to which they refer appear in 118 Cong. Rec. 4081-82 (1972), reprinted in Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, p. 1589-90 (1972).

These statements do not refer to Section 706 actions at all. On the contrary, Senator Javits made these statements in regard to Section 707 actions. Not only are these actions not at issue here, but all courts that have passed on the question, including the Fifth Circuit in Holmes, have ruled that these statements do not justify reading into Section 707 what defendants argue should be read into Section 706. Specifically, these courts have refused to read Section 707 as somehow making Rule 23 applicable to Section 707 actions (see p. 21 supra). That being so, it is hard to understand how Senator Javits' statements, which could not change the clear text of Section 707 in regard to which they were made, could change the clear text of Section 706 in regard to which they were not made.

In any event, Senator Javits' statements cannot justify changing the clear texts of Section 706 and Rule 23 in the manner espoused by the defendants. The first part of Senator Javits' statement reads as follows:

> These [i.e., Section 707 actions] are essentially class actions, and if they [i.e., the EEOC] can sue for an individual claimant, then they can sue for a group of claimants [emphasis and matter in brackets supplied]. 118 Cong. Rec. 4081 (1972), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, p. 1587.

Of course, even if this statement had been made in regard to Section 706 actions, it could not be construed as intending to express the

legislative intent that the actions to which it addressed itself were to be governed by Rule 23. All Senator Javits stated was that the actions of which he spoke were essentially class actions. This statement is wholly accurate: Section 707 as well as Section 706 actions are in their essence class actions, for they are actions brought by a representative on behalf of a class.

But this in no way means that they are class actions in the sense of Rule 23. They share the essential characteristic of Rule 23 class actions in that they are actions brought on behalf of a class, but differ from Rule 23 class actions in that they cannot comply with the requirements for the bringing of such actions and therefore result in judgments different from those rendered in such actions.

Defendants incorrectly assume that the only class actions that can exist are class actions of the kinds dealt with in Rule 23. Former Rule 23, as construed by the courts, recognized the so-called spurious class action, which was essentially a permissive joinder device and led to a judgment binding only on members of the class who

had intervened in the action. See James & Hazard, Civil Procedure, § 10.18 (2d ed. 1977). This type of class action is no longer part of Rule 23, as amended. But a Section 706 action brought by the EEOC is a variant upon the old spurious class action. It differs from it in that the Commission rather than a member of the class brings the action, but it resembles it in that the judgment rendered in it binds only the members of the class who have intervened or who have accepted their rights under it and knowingly waived any additional rights they might have. Accordingly, Senator Javits' statement that Section 707, and for that matter Section 706, actions brought by the Commission are essentially class actions is entirely accurate.

Senator Javits continued in his statement with a discussion of class actions, in an effort to familiarize his colleagues with the institution:

> It seems to me that this [i.e., class actions] is provided for by the rules of civil procedures in the Federal courts, and also it is inherent in the amendment which we adopted....[T]he Commission can only proceed by suit. And if it proceeds by suit, then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits.

> I have referred to the rules of civil procedure, I now refer specifically to rule 23 of those rules, which is entitled "Class Actions" and which give the opportunity to engage in the Federal Court in class actions by properly suing parties: We ourselves have given permission to the EEOC to be a properly suing party.

118 Cong. Rec. 4081-82 (1972), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, p. 1589-90.

On their face, these statements are wholly in accord with Senator Javits' earlier statement that Section 707 actions are essentially class actions. All Senator Javits did was indicate additionally what kinds of actions class actions were, that the basic notion of class actions was a familiar one, recognized in the Federal Rules of Civil Procedure, and that Section 707 actions were essentially of the same type. But nowhere did Senator Javits say that Section 707 actions were to be subject to, and would have to meet the requirements of, Rule 23. To the same effect, see Reiter, The Application of Rule 23 to EEOC Suits: An Examination of EEOC v. D.H. Holmes Co., 28 Syr. L. Rev. 741, 753, n.72 (1977).

On the contrary, what Senator Javits did state explicitly is that "if it [i.e., the Commission] proceeds by suit, then it can proceed by class suit." He thus put beyond doubt that the Commission, if it decided to sue, would have to meet no additional requirements for bringing a class action. He added that, if the Commission "proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits."

At the time Senator Javits made this statement, the Attorney General had never been required to satisfy Rule 23 in pattern and practice suits. And, in fact, no court has ever held either the Attorney General or the EEOC to the requirements of Rule 23 in such actions. Clearly, therefore, Senator Javits' statement explicitly confirms that, if the Commission proceeds by class suit, it need not meet the requirements of Rule 23.

Other legislative history relied on by defendants appears in the section-by-section analysis provided by Senator Williams. 118 Cong. Rec. 4942 (1972), Legislative History of the Equal Opportunity Act of 1972, p. 1173. We

submit that the following statement by Senator Williams confirms that Rule 23 does not apply to Section 706 actions:

> In establishing the enforcement provisions under this subsection and subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure.

This statement stresses that actions by the Commission do not in any way affect class actions brought under Rule 23 by private litigants. It was important for Senator Williams to stress this, for it dispelled the notion that actions brought by the Commission would displace Rule 23 class actions by private litigants. As Senator Williams noted, "the leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints."

Therefore, while Senator Williams' statement provides no support whatsoever for the contention that the legislature intended Rule 23 to apply to Section 706 actions by the Commission, it does support the view advanced here that actions by the Commission under Section 706 are additional to,

and different from, actions brought by private litigants under Rule 23.

Defendants have also made reference to other legislative history materials indicating that Congress intended the Federal Rules of Civil Procedure to apply to Section 706 actions. Of course, no one denies that these rules apply to civil actions brought by the Commission. Rule 1 explicitly so provides. But this does not mean that rules on their face inapplicable, such as Rule 23, apply to EEOC actions under Section 706.

Thus, the legislative history, although scant, supports the view that the Commission, in bringing Section 706 actions, need not comply with Rule 23. Plain meaning and legislative history therefore permit only one conclusion. As Senator Javits put it: "[I]f it [i.e., the Commission] proceeds by suit, it can proceed by class suit."

III

THE EEOC ACTION AUTHORIZED BY SECTION 706 IS SUI GENERIS.

The failure to recognize that Rule 23 class actions are not the only kinds of actions on behalf of a class, and that Section 706 authorizes the EEOC to bring a special and different kind of action, has been a root problem. Even the Ninth Circuit in the instant case, although properly holding that the Commission need not comply with Rule 23 in bringing a Section 706 action, appears to assume that Section 706 dispenses with the requirement of class certification, but that "other procedures of Rule 23 ... are available to the courts in an EEOC action." 599 F.2d at 333. The fact is, however, that the legislature has created a variant of class action that is not governed by Rule 23 for the simple reason that Rule 23 was not written for that type of class action and cannot properly be applied to it.

When the legislature decided to authorize the EEOC to bring an action on behalf of individual employees, it departed from an essential characteristic of the Rule 23 class action, for it

authorized a government agency, rather than an individual claimant who was a member of the class, to bring the action. This departure had significant consequences. Since the Commission is not a member of the class and has no claim of discrimination of its own, it is wholly different from the typical class action plaintiff in a Rule 23 action. Specificially, it cannot meet the requirements of Rule 23(a)(3) and (4), which seek to insure that the plaintiff's interest in the relief sought be the same as that of the members of the class it represents and that, as a result, the plaintiff can adequately represent, and therefore can constitutionally bind, the members of the class. However, since by definition the Commission's interest cannot be the same as that of the members of the class it represents, it cannot so adequately represent them that it can constitutionally bind them. Consequently, the Commission cannot bring a Rule 23 action whose purpose it is to produce a judgment binding upon the class. Instead, it can bring only an action on behalf of a class that is not binding upon all members of the class.

The Commission has itself consistently recognized that it cannot so adequately represent the class as to bind it by judgment. Its brief in the instant case and its petition for certiorari in the Holmes case are squarely based on its confessed inability fairly and adequately to represent the class within the meaning of Rule 23. This crucial and commendable admission by the Commission renders it impossible for the Commission, compatibly with the due process clause of the Constitution, to bind the class. Hansberry v. Lee, supra.

Of course, this circumstance by no means deprives Section 706 actions by the Commission of their utility. On the contrary, such actions are an extremely useful and efficacious device that most aptly reconciles the public interest in eradicating discrimination with the private interests of individual employees in obtaining the benefits that are their due.

It will normally be the Commission that pursues both the public interest and the interests of individual employees by bringing a Section 706 or 707 action. Once the Commission has brought

such an action, persons aggrieved may intervene (Section 706(f)(1), 42 U.S.C. § 2000e-5 (f)(1) (1976)), but may not bring their own action. Of course, when individuals intervene, they will be bound by the judgment. Affected employees who do not intervene may still accept the judgment and back pay awarded and waive the rights they may have. And when they do so, the employer is bound by the judgment to pay them their due under it. This is likely to occur in the vast majority of cases.

However, if the members of the class do not accept the judgment, they may pursue their rights in private actions. Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304 (9th Cir. 1977); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). See also Cox v. Allied Chemical Corp., 538 F.2d 1094, 1097-98 (5th Cir. 1976), cert. denied, 434 U.S. 1051 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159, 1172-73 (5th Cir. 1976), cert. denied, 429 U.S. 861 (1976) (holding employees bound by a conciliation agreement negotiated by the EEOC only if they accepted benefits thereunder and knowingly waived

their individual rights). Even in such actions under Section 706, the judgment obtained by the EEOC will provide the individual employees with a substantial benefit. For in such actions they may plead the judgment obtained by the EEOC, insofar as that judgment found the employer liable for forbidden discrimination in employment, as preclusive on that issue. This offensive use of the doctrine of collateral estoppel is appropriate under the holding in Parklane Hoisery Co. v. Shore, 439 U.S. 322 (1979), and it gives maximum effect to the judgment obtained by the EEOC, furthering the policy of effectively combating discrimination in employment.

The type of action which Section 706 authorizes the Commission to bring is therefore a most felicitously constructed procedural institution, which does exactly what the legislature wanted it to do. It permits the EEOC to proceed against prohibited employment practices, both on behalf of the common weal and on behalf of individual employees, by seeking relief that is as effective as it possibly can be without unconstitutionally depriving individual employees of rights they might wish to assert individually.

This type of action by a federal agency on behalf of a class is so ideally suited for its purposes that Congress has used it often. A number of statutes give such agencies the right to seek judicial relief, including pecuniary relief, on behalf of individual claimants. Indeed, the National Labor Relations Act gives the NLRB the right to seek judicial enforcement of an order directing an employer "to take such affirmative action including ... back pay" as may be appropriate. NLRA § 10(c), (e), 29 U.S.C. § 160(c), (e) (1976). Most significantly, it does so by using the same language that appears in Section 706(g) of Title VII. No one, of course, has ever thought of seeking to compel the NLRB to comply with Rule 23 when it seeks relief on behalf of individual employees.[4/] The use of the same

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4/ The Equal Employment Advisory Council states in its amicus brief (p. 12, n.19) that Rule 81, Fed. R. Civ. P., expressly exempts proceedings to enforce orders of the NLRB, including back pay orders, from application of the Federal Rules of Civil Procedure. This simply is not true. Rule 81(a)(5) provides that "the practice in the district courts [in proceedings to enforce orders of the National Labor Relations Board] shall conform to these rules so far as applicable." The only exception is that the Federal Rules shall not

language in Section 706 is clear evidence of the legislature's intention not to require compliance with Rule 23 when the Commission brings its similar action.

Use of this special type of action is also authorized by the Fair Labor Standards Act. Section 16(c) of this Act, 29 U.S.C. § 216(c) (1976), gives the Secretary of Labor the right to bring an action to recover unpaid minimum wages and unpaid overtime compensation on behalf of underpaid individual employees. No court has ever attempted to hold the Secretary of Labor to the requirements of Rule 23 when he proceeds under this section.

4/ cont'd.

alter the practice prescribed in 29 U.S.C. §§ 159 and 160 for beginning and conducting proceedings to enforce orders of the NLRB. However, these sections contain no reference to such proceedings as class actions, and they regulate only how such actions are to be brought (by petition) and how the transcript of proceedings before the NLRB is to be provided. What, significantly, § 159 of 29 U.S.C. does provide is that proceedings before the NLRB are also to be conducted in accordance with the Federal Rules of Civil Procedure. Accordingly, the analogy of the right of action of the EEOC with that of the NLRB is

One may well ask why so sustained an attempt is made to superimpose the wholly inappropriate requirements of Rule 23 upon Section 706 actions, while no such effort has been made in regard to similar actions under the National Labor Relations Act and Fair Labor Standards Act. The answer is apparent. The attempt to burden Section 706 actions with Rule 23 requirements is only another device in the fight to blunt the weapons which Congres has provided for combating discrimination.

As demonstrated, application of Rule 23 to EEOC actions under Section 706 would confront the courts with impossible tasks. If it would not preclude such actions altogether, it would provide an employer with the opportunity to raise a whole series of procedural obstacles. And, most significantly, if the district courts were to decide in favor of the employer on any of these issues so as to preclude the Commission from

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4/ cont'd.

particularly apposite. The NLRB has never been required to comply with Rule 23, even though Rule 81(a)(5) explicitly declares the Rules applicable. A fortiori, the EEOC should not be required to comply with Rule 23.

proceeding with the class aspects of the action, no interlocutory appeal would normally lie.[5/]

In an effort to add substance to their arguments, defendants have asserted that they would be seriously disadvantaged by the absence of the protections afforded by Rule 23. Their arguments are without merit.

First, defendants have argued that they would be better protected against further litigation by a judgment binding upon the members of the class. The argument disregards that the Commission cannot constitutionally represent a class of employees so as to bind all its members. Significantly, defendants fail even to mention this important constitutional obstacle.

Second, the defendants have argued that discovery would be unduly broad, unless the Commission were forced to comply with Rule 23.

5/ In Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), this Court held that the "death knell" doctrine could not serve as the premise for appealing interlocutory orders of this nature. In the absence of a double certification under 28 U.S.C § 1292(b) (1976), the Commission would be effectively prevented from proceeding in the manner authorized by the legislature.

This argument appears to assume that the plaintiff in a Rule 23 class action must identify the members of the class and the alleged discriminatory practices with greater particularity than in a Section 706 action. Since the assumption is unwarranted,[6/] the argument is as well.

Third, the defendants argue that in Section 706 actions, as distinguished from Rule 23 actions, the Commission could somehow recover back pay without proving the entitlement to it. This assumption is again unwarranted and so therefore is the argument for which it is the basis.

Defendants finally appear to suggest that it is somehow unfair to hold them bound to a judgment in a Section 706 action, while the individual employees who have not intervened are not bound. Apparently, the defendants wish to resurrect the dead doctrine of mutuality. There is, of course, nothing unfair about holding defendants bound by a judgment rendered in an action in which they had

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6/ Indeed, the Advisory Committee specifically stated that Rule 23(b)(2) is intended as a vehicle for class actions "in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Advisory Committee Notes re Proposed Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 102 (1965).

every opportunity to defend themselves. See Parklane Hoisery Co. v. Shore, supra. That, we submit, is exactly what the Congress wanted when it gave the Commission the right to sue on behalf of affected employees. That, we further submit, is exactly what is needed if discrimination in employment is to be effectively combated.

In any event, the ability of individual employees to invoke as collateral estoppel a judgment against an employer in a Section 706 action in no way depends on the action's having been brought as a class action. Offensive use of the doctrine of collateral estoppel may be made irrespective of whether the Commission's action may be characterized as any kind of class action. Moreover if the Commission is recognized as being authorized to bring an action and to seek back pay on behalf of a class, there is a greater likelihood that futher litigation by individual employees will be avoided, inasmuch as employees can be bound by accepting the judgment and waiving their rights; otherwise, further individual litigation premised on the prior finding of liability will be necessary. Consequently, recognizing that the EEOC can properly maintain

an action seeking class relief under Section 706 would only serve the defendants' stated goal of obtaining a judgment that will, to the furthest extent possible, avoid further litigation.

Conclusion

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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